UEM Sunrise Bhd & Ors v Majlis Perbandaran Johor Bahru Tengah

HIGH COURT (JOHOR BAHRU) — ORIGINATING SUMMONS 24NCVC-107–02 OF 2015
MOHD NAZLAN JC
23 FEBRUARY 2016

Civil Procedure — Witness — Court appointed expert — Appellants applied for appointment of two registered valuers by court pursuant to O 40 r 1 of the Rules of Court 2012 — Whether Local Government Act 1976 provides for appointment of two experts to assist court — Local Government Act 1976 s 145 — Rules of Court 2012 O 40

The appellants were the owners of the 61 lots of land ('the said land') whereas the respondent was the local authority having jurisdiction over the relevant area. The appellants were dissatisfied with the rates imposed under s 127 of the Local Government Act 1976 ('the LGA') by the respondent on the said land and filed an objection against the rates imposed on the ground that the holdings were valued beyond their rateable value. Dissatisfied with the decision of the respondent the appellants appealed against the said decision to this court. In the present action, the appellants applied for the appointment of two registered valuers by the court pursuant to O 40 r 1 of the Rules of Court 2012 ('the ROC') to assist the court in hearing the appeal by the appellants under s 145 of the LGA against the decision of the respondent. The appellants contended that, considering the size of the said land and the value of the said land, it would greatly assist the court to have reports of two valuers as court appointed experts in order to arrive at its decision in the appeal. In reply, the respondent contended that the application was misconceived for the LGA does not provide for the appointment of two experts to assist the High Court to hear an appeal under s 145 of the LGA.

Held:

(1) The application for the appointment of two registered valuers to provide their reports to the court in respect of issues concerning the valuation of the said land being the subject of this appeal against the decision of the respondent under s 145(1) of the LGA could not be legitimately premised on the said Act. There were plainly no provisions in the said Act which provide for such appointment in an appeal process (see para 9).

(2) The instant application which sought to empanel two registered valuers as experts to assist the High Court hearing an appeal under s 145 of the LGA akin to the statutorily mandated role of assessors in a High Court

land reference proceedings was beyond the jurisdictional remit of the ROC and was beyond matters purely procedural but potentially encroaching into the substantive provisions of the LGA which plainly did not recognise nor contemplate such an arrangement. Thus, the application by the appellant was plainly not sustainable under the law (see para 13).

(3) Since the court may, pursuant to s 145(4) of the LGA make a finding of facts on hearing the appeal, and bearing in mind the potentially technical nature and complexity of the valuation of some 61 properties, the independent role of the court appointed expert would more than likely assist the court in achieving an expeditious, economical and above all, just disposal of the appeal. Based on the aforesaid reasons, the court allowed the appointment of one registered valuer as a court expert under O 40 of the ROC (see paras 17–18).

[Bahasa Malaysia summary

Perayu-perayu adalah pemilik 61 lot tanah ('tanah tersebut') sementara responden adalah pihak berkuasa tempatan yang mempunyai bidang kuasa ke atas kawasan relevan. Perayu-perayu tidak berpuas hati dengan kadar yang dikenakan di bawah s 127 Akta Kerajaan Tempatan 1976 ('AKT') oleh responden atas tanah tersebut dan memfailkan bantahan terhadap kadar yang dikenakan atas alasan bahawa pegangan adalah dinilaikan melampaui nilai kadaran mereka. Tidak berpuas hati dengan keputusan responden, perayu-perayu merayu terhadap keputusan tersebut kepada mahkamah ini. Dalam tindakan ini, perayu-perayu memohon bagi pelantikan dua penilai berdaftar oleh mahkamah berikutan A 40 k 1 Kaedah-Kaedah Mahkamah 2012 ('KKM') untuk membantu mahkamah dalam pendengaran rayuan oleh perayu-perayu di bawah s 145 AKT terhadap keputusan responden. Perayu-perayu berhujah bahawa, mengambil kira saiz tanah tersebut dan nilai tanah tersebut, ia akan amat membantu mahkamah untuk mempunyai laporan kedua-dua penilai sebagai pakar yang dilantik oleh mahkamah untuk mencapai kepada keputusannya dalam rayuan tersebut. Dalam menjawab, responden berhujah bahawa permohonan adalah salah tanggap kerana AKT tidak memperuntukkan bagi pelantikan dua pakar untuk membantu Mahkamah Tinggi mendengar rayuan di bawah s 145 AKT.

Diputuskan:

(1) Permohonan bagi pelantikan dua penilai berdaftar untuk memberikan laporan mereka kepada mahkamah berkaitan isu-isu berkenaan penilaian tanah tersebut sebagai subjek rayuan ini terhadap keputusan responden di bawah s 145(1) AKT tidak boleh secara sah didasarkan atas Akta tersebut. Jelas tidak terdapat peruntukan dalam Akta tersebut yang mana memperuntukkan pelantikan sedemikian dalam proses rayuan (lihat perenggan 9).

(2) Permohonan ini yang mana memohon untuk memilih dua penilai berdaftar sebagai pakar untuk membantu Mahkamah Tinggi mendengar rayuan di bawah s 145 AKT sama seperti kepada peranan penaksir yang dimandatkan secara statutori dalam prosiding rujukan tanah di Mahkamah Tinggi adalah melampaui tanggungjawab bidang kuasa KKM dan adalah melampaui perkara prosedur sebenar tetapi berpotensi masuk ke dalam peruntukan substantif AKT yang mana jelas tidak menerima atau mempertimbangkan penyusunan sedemikian. Oleh itu, permohonan oleh perayu jelas tidak dapat dikekalkan di bawah undang-undang (lihat perenggan 13).

(3) Memandangkan mahkamah mungkin, berikutan s 145(4) AKT membuat dapatan atas pendengaran rayuan tersebut, dan mengambil kira potensi sifat teknikal dan kerumitan penilaian terhadap 61 hartanah tersebut, peranan bebas pakar yang dilantik oleh mahkamah akan berkemungkinan membantu mahkamah dalam mencapai keputusan dengan cepat dan cekap, menjimatkan dan lebih lagi, pendengaran rayuan tersebut. Berdasarkan atas alasan-alasan tersebut, mahkamah membenarkan pelantikan satu penilai berdaftar sebagai pakar mahkamah di bawah A 40 KKM (lihat perenggan 17–18).]

Notes

For a case on court appointed expert, see 2(5) *Mallal's Digest* (5th Ed, 2015) para 10568.

Cases referred to

Abbey National Mortgages plc v Key Surveyors Nationwide Ltd and others [1996] 3 All ER 184, CA (refd)

Inland Revenue Comrs v National Federation of Self-Employed and Small Businesses Ltd [1981] 2 All ER 93, HL (refd)

Lian Chen Fah @ Lian Chen Lee & Ors v Gimo Holdings Sdn Bhd [2008] 1 MLJ 135, HC (refd)

Legislation referred to

Courts of Judicature Act 1964 ss 16, 17
Federal Constitution art 13
Land Acquisition Act 1960 s 40A, 40A(2)
Local Government Act 1976 ss 127, 142(1), (1)(a), 145, 145(1), (4)
Rules of Court 2012 O 40, O 40 rr 1, 1(1), 4, 6

T Gan (Gan & Lim) for the appellants.
Fadil Ihsan (Khairul Aswad and Azrul Hisham with him) (The Chambers of Hisham Mukhtar) for the respondent.

Mohd Nazlan JC:

INTRODUCTION

[1] This is an application, documented in encl 9 filed by the appellants for the appointment of two registered valuers by the court pursuant to O 40 r 1 of the Rules of Court 2012 ('the RC 2012') with a view to assisting the court in hearing the appeal by the appellants under s 145 of the Local Government Act 1976 ('the LGA') against the decision of the respondent.

KEY BACKGROUND FACT

[2] The first appellant is the master developer of Nusajaya, which has an area of about 23,000 acres. The other appellants are the first appellant's related corporations, and owners of the 61 lots of land ('the said land') forming the subject matter of the appeal. The respondent is the local authority having jurisdiction over the relevant area.

[3] The underlying bone of contention in this instant case is that the appellants are dissatisfied with the rates imposed under s 127 of the LGA by the respondent on the said land. The appellants then filed their objections to the same under s 142(1) of the LGA, specifically on the basis of item (a) which concerns the ground that the holdings are valued beyond their rateable value. Section 142(2) further states the following:

> (2) All objections shall be enquired into and the persons making them shall at such enquiry be allowed an opportunity of being heard either in person or by an authorized agent.

[4] Dissatisfied with not only the outcome but also the decision-making process of the enquiry, the appellants exercised their rights to appeal against the decision of the respondent to this High Court under s 145 of the LGA.

[5] The instant application for the appointment of court appointed experts is thus made with the objective of preparing for the hearing of the appeal. This application is resisted by the respondent.

EVALUATION AND FINDINGS BY THIS COURT

[6] The appellants maintained that given the size of the said land, involving 61 lots and the total value fixed by the respondent at more than RM2.77 billion, it would greatly assist this court to have the reports of two valuers as court appointed experts in order to arrive at its decision in the appeal. For completeness, the appellants seek the following orders as specified in the notice of application:

(1) Menurut Aturan 40 Kaedah 1 Kaedah-kaedah Mahkamah 2012, 2 orang penilai berdaftar iaitu Tuan Haji Abdul Khalid bin Abdul Rahman dari Tetuan Assetz Sdn Bhd dan seorang penilai dari Jabatan Penilaian dan Perkhidmatan Harta Johor Bahru dilantik untuk memberi laporan kepada mahkamah yang mulia ini berkenaan 61 lot tanah yang menjadi subjek perkara rayuan ini dan untuk membantu mahkamah berkenaan perkara-perkara berkaitan isu penilaian hartanah;

(2) Yuran professional kedua-dua penilai tersebut ditetapkann oleh mahkamah yang mulia ini menurut Aturan 40 Kaedah 5 Kaedah-kaedah Mahkamah 2012;

(3) Lain-lain perintah atau relif yang difikirkan sesuai dan wajar oleh mahkamah yang mulia ini;

(4) Kos permohonan ini dalam kausa.

Alasan-alasan membuat permohonan ini adalah bahawa laporan pakar penilaian diperlukan untuk membantu mahkamah yang mulia ini membuat keputusan di dalam kes ini.

[7] The respondent submitted, on the other hand, that the application by the appellants is misconceived for the LGA does not provide for the appointment of two experts to assist the High Court to hear an appeal under s 145. Further, as the appellant already had a report on the said land prepared by its appointed valuer (as previously submitted to the respondent) now tendered into court for this appeal, its request for the appointment of additional experts by the court would tantamount as an attempt to improve on the valuation of the said land.

[8] In addition, it was further contended that the involvement of the court appointed experts in the appeal proceedings would be inappropriate and wrong as the appellants' challenge against the decision of the respondent following the objections filed by the former under s 142(1) also involves questions on the propriety of the decision making process of the respondent in dealing with the objections, particularly on the issue of the right to be heard embodied in s 142(2).

[9] In my view, the application for the appointment of two registered valuers to provide their reports to this court in respect of issues concerning the valuation of the said land being the subject of this appeal against the decision of the respondent under s 145(1) of the LGA cannot be legitimately premised on the said Act. There are plainly no provisions in the Act which provide for such appointment in an appeal process.

[10] Reliance by the appellants (as submitted by their learned counsel at the hearing) on s 40A of the Land Acquisition Act 1960 ('the LAA') providing for

the requirement for the appointment of two assessors vis a vis the issue of compensation is in my view neither comparable nor in any manner relevant to the instant appeal proceedings under the LGA. The relevant parts of s 40A of the LAA, for present purposes state the following:

> Constitution of the Court
>
> (1) Except as provided in this section the Court shall consist of a Judge sitting alone.
>
> (2) Where the objection before the Court is in regard to the amount of the compensation, the Court shall appoint two assessors (one of whom shall be the valuation officer employed by the Government) for the purpose of aiding the Judge in determining the objection and in arriving at a fair and reasonable amount of compensation.
>
> ...

[11] Whilst it is not disputed that the appointment of assessors is mandatory because the statutory language of s 40A(2) is unmistakably clear, nothing resembling anything similar to such requirements are found in the LGA. Further, the rationale for the need for the assessors is to assist the court in determining a fair amount of compensation. The application by the appellants before this court is merely said to be intended to assist the court in an appeal involving the valuation of the rates for some 61 lots of land; which rates are to be imposed on the appellants. In contradistinction, the assessors under the scheme of the LAA are required to assist in the determination of amount of compensation payable to those whose land are compulsorily acquired by the State under the LAA. The issue of compensation is manifestly an important one, for what s 40A seeks to achieve is to ensure legislative adherence to art 13 of the Federal Constitution that proscribes laws which provide for compulsory acquisition of property without adequate compensation.

[12] Even though the application for the appointment of two registered valuers by the court is made under O 40 of the RC 2012, evaluation of the same cannot be done in isolation for regard must also be had to the context of the relevant substantive proceedings and the applicable governing statutory framework. In this case, this would be an appeal under s 145 of the LGA. And considering the scheme of the LGA, it cannot be validly said that the appointment of two valuers to assist the High Court in deliberating on an appeal is either envisaged let alone sanctioned by the Act, not to mention the absence of any express provisions mandating the same to begin with, unlike the situation for the LAA, where the language is explicit even when the constitutional basis is already manifest.

[13] Furthermore, although having the force of statute, the legislative basis being ss 16 and 17 of the Courts of Judicature Act 1964, it is well established

that the RC 2012 govern only rules of procedure, and do not confer any new jurisdiction or create or alter substantive rights (see *Inland Revenue Comrs v National Federation of Self-Employed and Small Businesses Ltd* [1981] 2 All ER 93). The instant application which seeks to empanel two registered valuers as experts to assist the High Court hearing an appeal under s 145 of the LGA akin to the statutorily mandated role of assessors in a High Court land reference proceedings is beyond the jurisdictional remit of the RC 2012 and are beyond matters purely procedural but potentially encroaching into the substantive provisions of the LGA which plainly do not recognise nor contemplate such an arrangement. As such, I have no hesitation in holding that the application by the appellant is plainly not sustainable under the law.

[14] However, at the hearing, counsel for the appellants submitted that the court can order the appointment to be made pursuant to and the terms of the same to be within the strict confines of O 40 of the RC 2012. I am of the view that the appointment of one expert registered valuer to the extent that could be made within the provisions of O 40 may be justified. O 40 r 1(1) states as follows:

> 1 Appointment of expert to report on certain question (O 40, r 1)
>
> (1) In any cause or matter in which any question for an expert witness arises, the Court may at any time, on its own motion or on the application of any party, appoint an independent expert or, if more than one such question arises, two or more such experts, to inquire and report upon any question of fact or opinion not involving questions of law or of construction.

[15] In the first place, O 40 r 1(1) states that the court may at any time appoint an independent expert to inquire into and report on any questions of fact or opinion. It also permits the appointment of two or more experts if more than one question arises. This in my view must be construed as a situation permitting another or different expert to inquire into a different question before the court. In other words, this rule does not admit of a situation where two or more experts are appointed in respect of the same question, which is exactly what the appellants are proposing this court undertake. Thus this is another reason why the application by the appellants for the appointment of two registered valuers as court experts to assist the court in the appeal against the same decision by the respondent on the valuation of the 61 lots of properties cannot be acceded to.

[16] It is worthy of emphasis that the primary role of the court appointed expert is to inquire and report on any question of fact or opinion not involving questions of law or of construction. The *raison d etre* of O 40 is to assist the court to save costs and time for the litigants and also to ensure that a dispute is resolved expeditiously. The underlying rationale is thus to help litigants save costs of appointing individual experts particularly in cases like the present

where experts of the parties have given what can be said to be conflicting evidence on points of valuation of the said land. I should also add that it cannot be emphasised enough that the independence of the role of a court appointed expert is paramount and of great utility. Sir Thomas Bingham MR in *Abbey National Mortgages plc v Key Surveyors Nationwide Ltd and others* [1996] 3 All ER 184 held that the court expert 'with no axe to grind but a clear obligation to make a careful and objective valuation, may prove a reliable source of expert opinion'.

[17] Further, s 145(4) of the LGA clearly states thus:

> (4) Every such appeal shall be heard before the High Court whose decision on questions of fact shall be final and conclusive

In my view, since this court may, pursuant to s 145(4) of the LGA make a finding of facts on hearing the appeal, and considering the potentially technical nature and complexity of the valuation of some 61 properties, the independent role of the court appointed expert will more than likely assist the court in achieving an expeditious, economical and above all, just disposal of the appeal (see *Lian Chen Fah @ Lian Chen Lee & Ors v Gimo Holdings Sdn Bhd* [2008] 1 MLJ 135).

[18] As such I allow the appointment of one registered valuer as a court expert under O 40, who should be a person agreed by the parties and whose scope of his expert report should also be agreed by the parties, (but in any event largely to inquire and report on the valuation reports previously prepared by the parties that had led to the decision of the respondent now being appealed against), failing which shall be defined by the court. It is instructive to note that other provisions of O 40 shall apply accordingly, and these include the right of the parties to have the court appointed expert cross-examined following receipt of the report by the parties pursuant to O 40 r 4 of the RC 2012, and for parties to call expert witnesses to give evidence on matters reported on by the court appointed expert under O 40 r 6.

CONCLUSION

[19] In view of the foregoing reasons, my decision is to allow the appointment of only one registered valuer as a court expert under O 40 of the RC 2012 on the basis I mentioned in this judgment and whose appointment and function are to be strictly in adherence to O 40 of the RC 2012.

Order accordingly.

Reported by Dzulqarnain Ab Fatar